HARVARD
LAW REVIEW

VOL. XXXII FEBRUARY, 1919 NO. 4

STATE POWER OVER INTRASTATE RAILROAD RATES DURING FEDERAL CONTROL

IT is not proposed to discuss in this article the constitutional warrant for congressional legislation regulating intrastate railroad rates. The Federal Control Act [1] has been passed in the exercise of the war power and it is difficult to discover any substance in the suggestion that legislation under this power meets an insuperable barrier when it confronts intrastate rates. Since Congress may regulate intrastate railroad rates when this is necessary to the proper regulation of commerce among the states [2] it is clearly justified in regulating these same rates when to do so enables it the more effectually to carry out another of the great powers expressly conferred upon it by the Constitution.

That the war power is of sufficient scope to enable Congress to take over the transportation systems of the country is manifest; and since the effective operation of these systems requires that the government shall control all transportation thereon, and not merely the transportation of men and materials needed primarily for war purposes, it follows that the government must charge for the service rendered; and the conclusion is inescapable that it is entitled to determine for itself what that charge shall be. For it is elemen-

[1] Act of Congress of March 21, 1918.

[2] Houston East & West Texas Ry. Co. *v.* United States, 234 U. S. 342 (1914); American Express Co. *v.* Caldwell, 244 U. S. 617 (1917); Illinois Central R. R. *v.* Illinois, 245 U. S. 493 (1918); Henry Wolf Biklé, "Federal Control of Intrastate Railroad Rates," 63 UNIV. OF PENN. L. REV. 69.

tary that the federal government in the exercise of its powers is not dependent upon, nor obliged to defer to, state authority.[3]

But in certain instances the United States may, under the Constitution, permit the continued operation of state authority even in a field which the national government is entitled to occupy and in which it has exerted its activity. Familiar instances of this class of cases are found in the permitted taxation by the states of national banks and railroads incorporated by Congress.[4]

Passing, therefore, the constitutional aspect of the matter — since this seems too clear to require extended discussion — this article will be confined to an examination of the question whether the Federal Control Act has deprived the states of such power as otherwise they might have had to continue the regulation of intrastate railroad rates, or, while establishing federal possession and operation of the railroads, has permitted the continued exercise of state authority in connection with such rates.

The answer to this question is to be found, it is believed, in sections 10 and 15 of the Federal Control Act, the text of which is printed in the margin.[5] At the outset it is to be noted that the

---

[3] M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 424 (1819); *Ex parte* Siebold, 100 U. S. 371 (1879). *In re* Debs, 158 U. S. 564, 578 (1895).

[4] See, for example, Van Allen *v.* Assessors, 3 Wall. (U. S.) 573 (1865); Railroad Co. *v.* Peniston, 18 Wall. (U. S.) 5 (1873).

[5] "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be rea-

President is authorized to initiate rates, and it necessarily follows that the question of state power may arise either with respect to rates so initiated or with respect to rates which have been left unchanged by the Railroad Administration. But the Director-General of Railroads, by his General Order No. 28,[6] advanced substantially all transportation rates and fares of railroads under federal control, so that the important issue from the practical viewpoint is as to the power of the states to control rates initiated by the President. And consideration will first be given to this question.

It is to be noted first, that the authority devolved upon the President to initiate rates is not restricted by the terms of the act to interstate rates; in fact, there is no reason why it should be so restricted. The act is passed, not under the power to regulate commerce, but under the war power, and if it is desirable that the President initiate rates — an obvious necessity — no reason can be suggested which makes the exertion of this power less necessary

---

sonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: *Provided, however*, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

[6] Issued under date of May 25, 1918.

in the case of intrastate movements than in the case of those which are interstate.

A certain degree of confusion of thought seems to be engendered by the affirmative grant to Congress of the power to regulate commerce among the states, and the resulting habit of mind to attribute control over intrastate commerce to the states. But assume for the moment that the Constitution contained no grant of power to Congress with respect to commerce. Clearly, it would nevertheless be able, under the war power, to do just what it has done with respect to the transportation systems of the country. And from what source then would be derived the contention that the federal power is restricted to dealing with interstate rates? In any event, the President is authorized in section 10, "whenever in his opinion the public interest requires," to "initiate rates, fares, charges, classifications, regulations, and practices," and this power, granted without qualification or limitation, cannot be restricted by the courts to the field of interstate commerce.

This proposition is amply supported by the authorities.[7] In the Trade-Mark cases,[8] the court, dealing with the general language of the act of Congress there under consideration, said:

"It has been suggested that if Congress has power to regulate trademarks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And it is highly significant that in the three cases cited in the note the Supreme Court refused to limit the general language

[7] United States *v.* Reese, 92 U. S. 214, 220–21 (1875); Trade-Mark Cases, 100 U. S. 82, 98 (1880); Employers' Liability Cases, 207 U. S. 463, 500–01 (1908).

[8] 100 U. S. 98.

used by Congress even to save the legislation. In view of the well-settled rule to interpret legislation so as, if possible, to enable it to stand the test of conformity with the Constitution, it is clearly proper, *a fortiori*, to give general language its natural meaning when the constitutionality of the statute is not at stake. And, as has been pointed out, there is no constitutional reason for limiting the power of the President to interstate rates, since he is here acting under the war power which knows no such limitation.

Furthermore, there is abundant reason, from the practical standpoint, for giving this general language its natural meaning, since the President could not effectively or justly exercise the rate-making power with respect to interstate rates if he were without power to deal also with intrastate rates. Apart from the discrimination which would result, there would be innumerable instances where the intrastate movement constituted a movement of the utmost consequence to the military situation.

In addition, it is of no little consequence that the President, through the Director-General, has assumed to initiate intrastate rates, as well as interstate rates. Under the well-settled rule, the action of the executive department is entitled to great respect from the judiciary.[9] And, though it may not be possible to cite authorities to the point, it is not without significance that the entire country has acquiesced in the interpretation of the act adopted by the executive.

There being, therefore, no sufficient ground for doubting the President's authority to initiate rates, etc., the question arises whether, under the present act, rates, etc., so initiated are subject to the control of the states through the medium of their various regulating bodies.

Before proceeding to a consideration of this question it should be noted that the government is not operating the railroads under federal control through the medium of their corporation owners but directly and in the name of the Director-General. Bills of lading, passenger tickets, and other transportation contracts are issued in his name; the wages of employees are fixed and paid directly by him and his representatives; and actions at law and suits in equity must be brought against him and not otherwise.[10]

[9] Logan *v.* Davis, 233 U. S. 613, 627 (1914), and cases there cited.

[10] General Order, No. 50.

So also tariffs establishing rates and fares are issued by the Director-General and not by the corporations owning the transportation systems, and these tariffs are filed only with the Interstate Commerce Commission and not with the state commissions.

This mode of filing is, of course, in conformity with the Federal Control Act, since, if it be correct to say that the paragraph of section 10 which gives the President authority to initiate rates, etc., includes all rates, intrastate as well as interstate, it necessarily follows that the next clause which designates the manner of making "said rates," etc., effective, *viz.*, "by filing the same with the Interstate Commerce Commission" is operative with respect to intrastate rates as well as with respect to interstate rates. Clearly since no other procedure is specified in order to make such rates, etc., effective, it is not necessary to file such tariffs with state commissions. To require this would be to add to the conditions prescribed by Congress — for which, of course, there would be no justification.

The significance of this conclusion is manifest, for it means that intrastate rates, etc., now become effective by filing with the Interstate Commerce Commission, irrespective of the requirements of state statutes; and although such statutes may provide for a thirty days' publication before they may be changed, or even for a specific permission from the state commission, they may now be changed "at such time and upon such notice" as the President may direct. In fact, the sweeping changes in rates, etc., initiated in conformity with General Order No. 28 were made effective upon one day's notice. Clearly it would seem to follow that rates, etc., initiated by the President are regarded as in a special class and as withdrawn from the jurisdiction of state commissions, since the usual foundation of such jurisdiction, as established in state statutes, is generally, though not necessarily, the filing of tariffs establishing such rates, etc., with the state commissions.

Moreover, it is to be noted that by the initiation of rates, etc., the President supersedes the previously existing rates and the tariffs containing such rates cease to be effective, and the only effective tariffs are those currently on file with the Interstate Commerce Commission. The practical importance of this feature of the situation will be adverted to hereafter.[11]

[11] *Infra*, page 314.

But the act does not confide to the President — as doubtless it might have done — the final determination of the reasonableness of rates, etc. It proceeds to define with some elaboration in the third and fourth paragraphs of section 10 the method of review which the shipper or traveler who deems himself aggrieved may invoke, in order that it may be determined whether the rates, etc., conform to the standard prescribed, *i. e.*, whether they are "reasonable and just." And the method of review prescribed is limited to proceedings before the Interstate Commerce Commission. There is no implication — even the most remote — that rates, etc., initiated by the President may be reviewed by state commissions because they happen to cover transportation wholly within a state. This silence is eloquent, and an examination of the various provisions of the law, as well as of general legal principles applicable, leads to a single conclusion, *viz.*, that such state commissions are not entitled to assert any authority with respect to such rates.

And first with respect to the provisions of the act. It is to be noted that the second paragraph of section 10 provides that rates, etc., initiated by the President "shall not be suspended by the [Interstate Commerce] Commission pending final determination" as to their reasonableness and justness. Now, as is well known, many state commissions have the power to suspend intrastate rates, etc., pending an inquiry as to their reasonableness, etc., and no express prohibition is found in section 10, or any other part of the act, against such suspension. But is it conceivable that Congress meant to permit a state commission to exercise with respect to rates, etc., initiated by the President an authority denied the Interstate Commerce Commission?

The power of suspension is well understood and its importance is difficult to exaggerate. Apart from the inherent improbability that Congress would have subjected rates, etc., initiated by the President to a greater degree of control on the part of the state commissions than on the part of the Interstate Commerce Commission, it must be remembered that there are also the practical considerations against implying the power resulting from the fact that the exercise of such power by a state would not only impede the federal government in its effort to establish a proper scale of rates, etc., in order to derive adequate revenue from the operation

of the railroads, but would seriously derange the general rate structure by establishing local preferences and discriminations.

It seems clear, therefore, that the limitation of the prohibition against suspension to suspension by the Interstate Commerce Commission confirms the conclusion that Congress regarded the remedial procedure which it was establishing as limited to that commission — in other words, it was unnecessary to deny the right of suspension to the state commissions, since under the system provided in the act it was not intended that they should exercise any authority whatsoever with respect to rates, etc., initiated by the President. It is difficult to find any other explanation of the language, and it is believed that no other reasonable interpretation can be suggested.

And this conclusion is strengthened by further provisions of section 10. In the first place, rates, etc., initiated by the President are required to be "reasonable and just." This is the only standard to which they are required to conform, and there is no warrant for the application of any other or additional standard. But nothing is provided with respect to the enforcement of this standard by the state commissions, or with respect to the evidence they should consider in determining whether rates, etc., conform to this standard, or with respect to the powers they might exercise to remedy any variance therefrom. On the contrary, all these matters are carefully dealt with in the provisions of the act relative to procedure before the Interstate Commerce Commission. That commission is specifically authorized to receive complaints with reference to rates, etc., initiated by the President; it is required to "enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate," etc.; it "may consider all the facts and circumstances existing at the time of the making of the same;" it is to "give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition;" it is to "take into consideration" a "finding and certificate by the President" as to the necessity for additional revenue to defray the expenses of federal control and operation, etc., "together with such recommendations as he may make;" and finally it "may make such findings and orders as are authorized by the act to regulate commerce as

amended, and said findings and orders shall be enforced as provided in said act."

With all these careful and specific directions as to how rates, etc., initiated by the President may be reviewed by the Interstate Commerce Commission, it is almost inconceivable that Congress could have intended that such rates should be subject to review by state commissions unrestricted by any directions as to procedure or remedial measures. This conclusion seems inescapable when it is remembered that the powers of the state commissions differ in many, and frequently in material, respects from those of the Interstate Commerce Commission. Without seeking further illustrations it is sufficient to point out that many state commissions may issue orders effective for a period substantially greater than the two-year period to which the Interstate Commerce Commission is restricted. Thus in one case a state commission required the maintenance of certain passenger fares for ten years.[12]

And it is not believed that any sound argument can be based upon the contention that the Interstate Commerce Commission is empowered to make findings and orders authorized by the Act to Regulate Commerce, and that these must necessarily be restricted to interstate rates, etc. This provision defines the remedies which the commission may apply, but enlarges the scope of these remedies. Since the Federal Control Act brings within the jurisdiction of the commission new rates, etc., it is only natural that there should be a definition of the remedies which it may apply — an extension of power similar in essential character to other enlargements of the commission's authority brought about by amendments to the Act to Regulate Commerce.

But, in addition to these considerations which relate primarily to procedure, it is significant that the act establishes, as has been pointed out, its own standard to which rates, etc., initiated by the President must conform, and necessarily this standard supersedes all state standards unless the act itself saves them.[13] Apart, how-

[12] P. R. R. *v.* Public Service Commission, 126 Md. 59, 82 (1915). In fact, in Detroit & Mackinac Ry. Co. *v.* Michigan Veneer Co., 000 U. S. 000 (decided November 18, 1918), the court holds that "There is nothing to hinder a State from providing that after a judicial inquiry into the validity of such an order, it shall be binding upon the parties until changed."

[13] Northern Pacific Ry. *v.* Washington, 222 U. S. 370 (1912); Michigan Central R. R. *v.* Vreeland, 227 U. S. 59 (1913); So. Ry. *v.* R. R. Commission, 236 U. S. 439 (1915).

ever, from the consideration that there is nothing in the act which indicates an intention to preserve the varying standards established by state laws, it is manifestly desirable, from the practical point of view, that rates, etc., initiated by the government should be subject to but one test enforceable in one tribunal.

The contention that state authority still continues seems to be rested entirely on the first sentence of section 10 and the provisions of section 15 of the Federal Control Act. The first sentence of section 10 provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

Before referring to the provisions of section 15 it should be pointed out that this sentence seems clearly to except the situation now under consideration; *i. e.*, a situation in which an order has been issued by the President. Manifestly it would be inconsistent with such order for a state to order that the rates, etc., should not be charged which the President has directed shall be charged. In addition, the reasons heretofore and hereafter suggested for holding the remedial procedure specifically provided in section 10 the exclusive remedy in case of rates, etc., initiated by the President show clearly, it is believed, that it would be "inconsistent with the general provisions of this act [the Federal Control Act]" to hold the general provisions of the first sentence of section 10 sufficient to permit state control of rates, etc., initiated by the President.

Section 15 of the Federal Control Act, which also is invoked in support of state authority, is as follows:

"That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

Pretermitting for the moment the questions whether this section properly construed can be regarded as intended to keep alive the power of the state with respect to rates, etc., and whether the exercise of such power might affect the transportation of troops, etc.,

there seem to be two well-settled rules precluding any construction of the section which would sustain the power of the state to control rates, etc., initiated by the President.

In the first place, when a statute creates a right and provides a particular remedy for its enforcement, such remedy is generally held to be exclusive.[14] This rule is apparently bottomed on legislative intention, as the Supreme Court points out in *United States* v. *Stevenson*,[15] where Mr. Justice Day said:

"The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that where a statute creates a right and prescribes a particular remedy that remedy, and none other, can be resorted to. An illustration of this doctrine is found in *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, in which it was held that in the copyright statutes then in force Congress had provided a system of rights and remedies complete and exclusive in their character. This was held because, after a review of the history of the legislation, such, it was concluded, was the intention of Congress.

"The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect. *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238, 239. In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy intended to take from the Government the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie, and the court below was correct in its conclusion."

That this general rule may properly be invoked in determining the correct construction of the Federal Control Act would seem apparent from the following considerations:

(*a*) Had Congress intended to continue the remedial procedure heretofore applicable in connection with rates, etc., it would have been extremely easy for Congress to have used simple language

[14] Globe Newspaper Co. *v.* Walker, 210 U. S. 356 (1908).

[15] 215 U. S. 190, 197 (1909).

evidencing this intention. In lieu of such language, a special and definite procedure is established.

(*b*) The action of the President, or of his duly constituted representative, in initiating rates, etc., involves the exercise of discretion and consequently would not be subject to judicial control,[16] and it would seem necessarily to follow that the exercise of such discretion would not be subject to administrative control except to the extent that the act of Congress specifically makes it so.

(*c*) In like manner, a proceeding against the Director-General is in substance a proceeding against the United States and accordingly cannot be maintained except by the express permission of the government,[17] and whatever be the construction to be given to section 15, it certainly contains nothing evidencing the consent of the United States to be made respondent in proceedings before state commissions. The remedy specifically allowed before the Interstate Commerce Commission is therefore created by the statute, and it is impossible to find a justification for any other remedy elsewhere. Necessarily, this remedy is exclusion.

And this conclusion is reënforced by the provisions of the first paragraph of section 10, which authorize "actions at law or suits in equity" to be brought by and against "carriers." Now if it should be held that this paragraph is intended to authorize a proceeding against the United States, a conclusion of doubtful soundness, it is highly significant that it does not authorize proceedings before state commissions. "Actions at law" and "suits in equity" are technical phrases indicating well-known forms of procedure and do not include proceedings before commissions. This consideration, therefore, lends weight to the view that the statutory remedy before the Interstate Commerce Commission is the only *remedy* intended to be available in connection with rates, etc., initiated by the President.

The second well-settled rule which reënforces the conclusion reached from a scrutiny of the language of the act, that the remedy before the Interstate Commerce Commission is exclusive, is found in the principle that when one part of a statute deals specifically

[16] Marbury *v.* Madison, 1 Cranch (U. S.), 137 (1803).

[17] Louisiana *v.* Garfield, 211 U. S. 70 (1908); Louisiana *v.* McAdoo, 234 U. S. 627 (1914); New Mexico *v.* Lane, 243 U. S. 52 (1917).

with a certain matter, which it may be contended is dealt with more generally in another part of the same statute, the specific provisions apply rather than the general provisions.[18]

From what has been said it is clear that the only portions of the statute which can be opposed to the specific provisions of section 10, confiding to the Interstate Commerce Commission a degree of jurisdiction with respect to rates, etc., initiated by the President, are cast in very general language, and it would seem necessarily to follow that these specific provisions must be regarded as controlling, and the general provisions must be construed as not intended to operate where the specific provisions apply.

Turning now to the precise words of section 15, a significant difference is disclosed in its reference to the states' power of taxation and the states' police power. The "existing *laws or powers* of the States in relation to taxation" are not to be amended, etc., but it is only the "*lawful police regulations*" of the states that are to be accorded a like immunity from change. There must have been some reason for refraining from preserving the "*police power*" of the states to the same extent as the taxing power. It seems not unreasonable to regard the words "police regulations" as intended to refer to police regulations already in effect which were to remain in effect unless superseded by acts of the President under the Federal Control Law.

Or, possibly, the words are intended to refer to the "police power" in its more limited and proper use as describing the authority of the state to legislate to protect the health, safety, and morals of its people,[19] and not in its more extended and general use, within which the power to regulate rates, etc., has sometimes been classified. For there is grave doubt whether the regulation of rates, etc., by the states is in truth a branch of the police power within the meaning of section 15. It is true that various cases have so characterized it when referring to the general classification of legislation.[20] But this use of the term is clearly open to just criticism.

[18] Rodgers *v.* United States, 185 U. S. 83 (1902); *In re* Anderson, 214 Fed. 662 (1914); Colonial Navigation Co. *v.* N. Y., etc. Co., 50 L. C. C. 625 (1918), and cases cited.

[19] See the difference between "police power" and "police regulations" suggested in 31 CYCLOPEDIA OF LAW AND PROCEDURE, 902–03.

[20] Munn *v.* Illinois, 94 U. S. 113 (1876); Budd *v.* New York, 143 U. S. 517, 534, 537,

In the first place, the "police power," as referred to in the decisions, seems to be used in two ways: usually as referring to laws for the promotion of the public health, safety, and morals, but sometimes and less frequently, as referring to laws intended more generally for the public welfare. But, as Chief Justice Taney long ago pointed out,[21] practically all laws are police laws in this sense. That the "police power" in its more proper and limited sense is an inexact description of the rate-making power would seem to result from the following considerations:

(*a*) In the first place it is well settled that the state police power cannot be bargained away, and yet it is equally well settled that the state may make a binding contract with a public utility which will preclude it, for a substantial period of time, from regulating the rates of that utility.[22]

(*b*) In the second place, the rate-regulating power is subject to the limitation that it may not be so exercised as to deny the public utility a reasonable return on the fair value of the property which it devotes to the public service; but the police power, in its true sense, is not subject to any such restriction, since it is well settled that it is permissible to require uncompensated obedience to a law which is essentially one of police. Both of these elementary principles are violated if we treat the rate-regulating power as a part of the state's police power.

A true classification of the power to regulate rates, etc., would assimilate it to the power of eminent domain. The state requires a given service and fixes the price at which it shall be rendered.[23] Just as the taking of the railroads by the government is a striking illustration of the exercise of this power, although it constitutes the taking of a limited interest or use only, so the taking of an even more limited use of the property, as for example, the requiring of the furnishing of a freight car to be used for the transportation of

---

544 (1892); German Alliance Insurance Co. *v.* Kansas, 233 U. S. 389 (1914); Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 578, 579 (1917).

[21] License Cases, 5 How. (U. S.) 504, 582–83 (1847).

[22] Detroit *v.* Detroit Citizens' Street Ry., 184 U. S. 368 (1902); Cleveland *v.* Cleveland City Ry. Co., 194 U. S. 517 (1904); Minneapolis *v.* Street Ry. Co., 215 U. S. 417 (1910).

[23] It is true that prices may sometimes be regulated, although there is no *legal* obligation to sell or render service; but it is not believed that this changes the essential situation since in the majority of instances there is a *practical* compulsion.

a commodity from point X to point Y subjects the property of the carrier to the use of another person, the government determining the compensation for this use. The resemblance to eminent domain is further emphasized by the fact that the enterprise must be affected with a public interest to justify rate- or price-regulation.[24] Treating the power as thus related to the power of eminent domain furnishes an adequate basis for the rule that the compensation must be fair, and that the business must be affected with a public interest, neither of which rules is a natural corollary of a classification which would place the rate-regulating power under the police power.

It is not believed, therefore, that the provisions of section 15 are sufficient to confer upon the states the power to control rates, etc., initiated by the President; but even if a different construction were adopted the states would be entirely devoid of power to require the United States to appear as a party respondent in proceedings before their various commissions. As has been pointed out above, such a proceeding would constitute a suit against the United States, and could not be maintained without express permission, and no such permission has been granted. Permission to hale the Director-General before a commission in order that he may justify his rates, etc., is limited to proceedings before the Interstate Commerce Commission.

Practical considerations, therefore, reënforce the construction which is sustained by a scrutiny of the terms of the act and by such well-settled rules of construction as are applicable. For, if a complaint is filed with a state commission against the corporation owner of the property, it truthfully answers that it is not in control of the rates, etc., complained of and is powerless to accord any relief. The Director-General cannot be called in, for to require his presence would be to subject the United States to the jurisdiction of the state without its permission.

From every point of view, therefore, it seems clear that the state is without authority during federal control to regulate rates, etc., initiated by the President.

Since under General Order No. 28 practically all rates and fares have been specifically determined by the President and have been initiated in the manner provided in the act, the question as to

[24] German Alliance Insurance Co. *v.* Kansas, 233 U. S. 389 (1914).

rates, etc., left untouched by his orders, is largely academic. What has been said is applicable in some measure to this question, though in a case involving such a situation it would be impossible to rely on the proposition which is the central thought of this discussion, *viz.*, that the Federal Control Act provides specifically the exclusive remedy for rates, etc., initiated by the President. But, if a complaint should be filed with some state commission, relative to a rate not initiated by the President, it would be a simple matter for the President to initiate a rate between the points in question; so that any difficulties which might be anticipated in this quarter do not seem to be of a practical nature.

Finally, this construction is in furtherance of the provisions of the President's Proclamation of April 11, 1918, which reads as follows:

"Until, and except so far as, said Director-General shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director-General shall have paramount authority and be obeyed as such" —

a provision which is almost verbatim the same as a corresponding provision in the President's Proclamation of December 26, 1917.

It should be noted in conclusion that the rates, etc., initiated by the President have superseded the previously existing rates, etc., both interstate and intrastate. Rates so superseded are non-existent and cannot be revived, but new tariffs must be published if the current rates, etc., are to be changed. It would seem to follow that if federal control were to come to an end without any new legislation the existing rates would continue as the lawful rates on intrastate traffic as well as on interstate traffic, and new tariffs would have to be filed with the state commissions. It seems inconceivable, however, that federal control could terminate without some additional legislation and such legislation will doubtless deal with the rate question.

Henry Wolf Biklé.

LAW SCHOOL,
UNIVERSITY OF PENNSYLVANIA.